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In the

Supreme Court of the United States

OCTOBER TERM, 1958

No. 252

SAFEWAY STORES, INCORPORATED,
Appellant,

v.

OKLAHOMA RETAIL GROCERS ASSOCIATION, INC., and LOUIE J. SPEED, INC.,
Appellees.

On Appeal from the Supreme Court of the State of Oklahoma

BRIEF OPPOSING MOTION TO DISMISS

V. P. CROWE,
ROBERT L. CLARK,
RAMSEY CLARK,
WILLIAM L. KELLER,
Attorneys for Appellant.

Of Counsel:
EMBRY, CROWE, TOLBERT, BOXLEY & JOHNSON,
570 First National Building,
Oklahoma City, Oklahoma.

CLARK, REED & CLARK,
1900 Adolphus Tower,
Dallas 2, Texas.

Counsel of Record:
ROBERT L. CLARK,
1900 Adolphus Tower,
Dallas, Texas.

WARLICK LAW, INC —1207 HORD STREET—DALLAS—RI 1-6711

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Appellees have moved to dismiss this appeal as not involving a substantial federal question and as resting on an adequate non-federal basis. This brief is in reply to the arguments advanced in that motion.

QUESTION ONE

Appellant has asserted that the judgment below denies it the right to meet prices that its competitors are free to set

in contravention of the Due Process and Equal Protection clauses of the Fourteenth Amendment.

This proscription arises from the injunction which prohibits appellant from selling below cost in violation of the Oklahoma Unfair Sales Act "* * * except to meet in good faith the prices of competitors who are selling * * * at cost to them as retailers * * *," Jurisdictional Statement, Appendix A, p. 44.

Appellant's competitors are selling groceries every day throughout Oklahoma at prices below their costs, but not in violation of the Act. Appellant cannot meet these lawful prices. It cannot enjoin these lawful prices. The very merchant whose price appellant would meet could hail it into court on contempt charges.

This Act and this injunction are unique in American jurisprudence. No other state statute and certainly no federal statute prohibits one merchant from meeting the price of another who is merely selling below his cost. Many state statutes prohibit the meeting of illegal prices. Perhaps the meeting competition defense is not available under the Federal anti-trust laws where the price being met is unlawful. But there is a vast difference between a price below cost and an unlawful price. Indeed, the area between the two is the area of the most effective price competition in the retail grocery industry.

As a nation we have long had faith in the value of competition. Now the Supreme Court of Oklahoma has said

that it is unlawful for a merchant in Oklahoma to set "* * * prices for the sole purpose of meeting prices of its competitors * * *" selling below their cost even though the competitors' price is lawful. Jurisdictional Statement, Appendix A, p. 27. A price below cost set without regard to competition may be lawful, but if set "* * * for the sole purpose of meeting prices of its competitors * * *" it is *ipso facto* unlawful.

The unlawful purpose and effect, otherwise essential ingredients of an unlawful price, are immaterial where the meeting competition defense is asserted. The only criterion then is whether the price being met is below cost. Meeting competition is in itself an unlawful purpose.

Appellees have cited three cases under this question. They are *F. T. C. v. Staley, 324 U. S. 746, 89 L. Ed. 1338; Standard Oil Co. v. F. T. C., 340 U. S. 231, 95 L. Ed. 239;* and *Standard Oil Co. v. F. T. C., 355 U. S. 396, 2 L. Ed. 2d 359.* They are cited for the proposition that to invoke the meeting competition defense, the price being met must be lawful. The cases involve statutory construction of the Robinson-Patman Act. Appellant's complaint is not that it cannot meet an unlawful price. Appellant is enjoined from meeting a lawful price.

Such an injunction cannot stand. In the second *Standard Oil* case, *supra*, there was "* * * no showing or serious contention by the Commission * * *" that Standard Oil's competitors were making offers to sell at unlawful prices. As a result, Standard Oil was acquitted. But it is irrelevant here that the prices appellant meets are lawful if they are simply below cost.

Appellees state that the trial court found the prices met by appellant were unlawful. While we disagree, it makes no difference. It is the injunction that is being appealed from. Appellant is enjoined from meeting a competitor selling below cost. Even in the record below, there is not a scintilla of evidence as to the legality or illegality of the prices appellant met. The only support for any such finding is the statement of the trial judge that appellant stated

> "* * * it reduced the prices on the various items complained of to meet competition, contending that it could only presume that the prices it was meeting were legal prices. I don't think that is a logical presumption, gentlemen, for here we have one of the largest chain of grocery stores, who undoubtedly, because of their size, can buy as cheap or cheaper than anyone else." Jurisdictional Statement, Appendix A, p. 54.

The life of the retail grocery industry has not been logic: it has been experience. Appellant would happily substitute the trial court's logical presumption for its experience. Under any circumstances, there can be no logical presumption that the merchant whose prices were being met had an unlawful purpose and that his acts had a prohibited effect. At most there may be some notice that the prices being met may be below the competitor's cost. But a price below cost is not an illegal price. Illegality involves an unlawful purpose and a prohibited effect as well.

There is an aspect of this case that transcends in significance the Oklahoma Unfair Sales Act and, indeed, even the rights of these parties. That is the interplay between economic liberty and individual freedom. There is within the framework of our Constitution a protection to economic

liberty more fundamental than the preservation of an individual's property rights. Without developing the point, or relating it to this case, we would call to mind the admonitions of Adam Smith, F. B. W. von Herrmann, John Stuart Mill, Karl Menger, Lujo Brentano, Henry Sidgwick, Alfred Marshall, F. A. Fetter, and F. H. Knight, and of John Locke, David Hume, Jeremy Bentham, Wilhelm von Humboldt, Alexis de Tocqueville, Jacob Burckhardt, Lord Acton, A. E. Dicey, Earnest Barker, and F. A. Hayek. The proposition is stated with considerable restraint by Henry Simons as follows:

> "It seems clear, at all events, that there is an intimate connection between freedom of enterprise and freedom of discussion and that political liberty can survive only within an effectively competitive economic system."

Henry C. Simons, *Economic Policy For A Free Society*, The University of Chicago Press, 1948.

Oklahoma has arbitrarily prohibited competition in its most vital function; freedom to meet a price that a competitor is free to set. Compare this to the case of *Balian Ice Cream Co. v. Arden Farms Co. (U. S. D. C. Calif., 1952), 104 F. Supp. 796, 801, aff'd 231 F. 2d 356, cert. den. 350 U. S. 991, 100 L. Ed. 856*, where the court was concerned with an alleged violation of the Robinson-Patman Act, and said on the question of the meaning of competition and the fundamental right to meet the prices set by competitors:

> "* * * Reputable concerns constantly advertise, 'We will not be knowingly undersold.' And no case exists in which the courts have held that a price reduction, in itself, not having as its purpose the destruction of

a competitor or the monopolization of trade or commerce, but made to meet competition in the field or to retain trade or customers or to gain new customers, is *illegal as such.*

* * * * *

"'The right of a seller to lower his price in good faith to meet the equally low price of a competitor in the sale of goods of like grade and quality, is, *in reality, the right to compete.* For to deny a seller the right to meet his competitor's lower price to his customer is in effect to deny him the right to compete with that competitor. A 1941 Report of the Federal Trade Commission, to a Congressional Committee, is in part:

"'"*The right of self defense against competitive price attacks is as vital in a competitive economy as the right of self defense against personal attack.*" (Emphasis added by Court.)'"

As it should be, "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." *Williamson v. Lee Optical Co. of Oklahoma, 348 U. S. 483, 488, 99 L. Ed. 563, 572.*

Any other rule is inconsistent with democracy.

On the other hand, it is the Constitution that safeguards our freedoms and this Court will not uphold a statute which is "* * * arbitrary, discriminatory or demonstrably irrelevant to the policy the Legislature is free to adopt and hence an unnecessary and unwarranted interference with individual liberty." *Nebbia v. New York, 291 U. S. 502, 539, 78 L. Ed. 940, 958.*

QUESTION TWO

Question Two arises because, as was readily noted in the first law review article written on the case below, Oklahoma "* * * virtually forces competitors to use trading stamps." *Competition From Retailers Issuing Trading Stamps Cannot Be Met By Price Reductions Equivalent To Value Of Stamps. 36 Texas Law Review 691, 694.* For some reason, or more accurately for no reason, Oklahoma now restricts discounts for prompt payment of cash given by retailers to the media of trading stamps and other evidences of credit.

The question for this Court is whether there is a difference between trading stamps and other methods of giving discounts for cash which justifies permitting the former and prohibiting the latter. The way in which the question has arisen tends to obscure a clear focus of the problem. The question is identical with the question which would arise if the legislature of the State of Oklahoma had said "Retailers may give trading stamps and other evidences of credit in connection with the sale of goods at retail at statutory cost as a discount for the prompt payment of cash; provided that the discount cannot be given in any other way."

Appellees argue that trading stamps are a discount for prompt payment of cash and not a price cut as indeed the Supreme Court of Oklahoma held. Numerous cases are cited in support of this legal conclusion.

They further argue that cash as the discount, like the customary way of giving the discount by a net price for cash payment, is a price cut. "There is no magic in the words 'cash discount.' When subjected to analysis they are merely a euphemism for what is in reality a price cut." *Colgate-Palmolive Company v. Elm Farm Foods Co., 148 N. E. 2d 861 (Sup. Jud. Ct. Mass. 1958).* What lawyer would argue with Mr. Justice Holmes' legal analysis of the trading stamps as "* * * a draft upon another merchant, payable in goods * * *"? *Commonwealth v. Sisson, 60 N. E. 385 (Mass. 1901).* Of course, in many instances the draft is on the merchant giving it and is sometimes payable in cash.

Is the action of Oklahoma arbitrary, or discriminatory?

Why should the housewives of Oklahoma be denied the right to buy at the lowest net price prescribed by the legislature? Why should they be forced to buy with what they want, a trading stamp? Why should the merchants be driven to use trading stamps? Why should they be denied the right to give the type of discount they choose? Why should the trading stamp companies be granted, as a practical matter, a state monopoly of the cash discount business?

What policy was the legislature attempting to adopt in connection with cash discounts on sales at retail? The answer is clear. None. As the four dissenting Justices below said, "The Act does not authorize discounts for cash in retail sales." Jurisdictional Statement, Appendix A, p. 38. What justification is there then for this discrimination?

QUESTIONS THREE AND FOUR

Appellees have not discussed these questions in their Motion to Dismiss. We will not develop these points further at this preliminary stage.

CONCLUSION

This appeal brings before this Court substantial federal questions both in terms of the far-reaching legal questions involved and in the practical effect on our national economic policy. The questions presented are so substantial as to require plenary consideration with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

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ROBERT L. CLARK

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RAMSEY CLARK

.....

WILLIAM L. KELLER

Of Counsel:
EMBRY, CROWE, TOLBERT,
BOXLEY & JOHNSON,
570 First National Building,
Oklahoma City, Oklahoma.

CLARK, REED & CLARK,
1900 Adolphus Tower,
Dallas 2, Texas.

Counsel of Record:
ROBERT L. CLARK,
1900 Adolphus Tower,
Dallas 2, Texas.

PROOF OF SERVICE

I, Ramsey Clark, one of the attorneys for Safeway Stores, Incorporated, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 22nd day of September, 1958, I served copies of the foregoing Brief Opposing Motion to Dismiss on the several parties thereto, as follows:

On Oklahoma Retail Grocers Association, Inc., a corporation, and Louie J. Speed, Inc., a corporation, by mailing copies in duly addressed envelopes, with airmail postage prepaid, to their respective attorneys of record, as follows:

Miskovsky & Miskovsky, Highower Building, Oklahoma City, Oklahoma;

William J. Holloway, Sr., First National Building, Oklahoma City, Oklahoma;

Looney, Watts, Looney & Nichols, First National Building, Oklahoma City, Oklahoma;

Samuel M. Lane, 26 Broadway, New York City, New York.

.....

RAMSEY CLARK,
1900 Adolphus Tower,
Dallas 2, Texas,
Attorney for Safeway Stores, Incorporated.